Filed 5/8/19 Marriage of P. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of DAISY and MARK P.	
DAISY B. P., Appellant, v. MARK C. P., Respondent.	E068889 (Super.Ct.No. SWD1700185) OPINION

APPEAL from the Superior Court of Riverside County. James T. Warren, Judge. Reversed with directions.

Jenner & Block, Julie A. Shepard, Nayiri K. Pilikyan, Elizabeth Capel; Family Violence Appellate Project, Jennafer Dorfman Wagner, Shuray Ghorishi and Erin C. Smith for Appellant.

John L. Dodd & Associates, John L. Dodd, and Benjamin Ekenes for Respondent.

Daisy P. appeals an order denying her request for a domestic violence restraining order against her husband, Mark P., which she sought after petitioning to dissolve their marriage. Daisy represented herself in the trial court but is represented by counsel on appeal. She argues the trial court erred by concluding she had not alleged certain incidents of sexual abuse and by excluding other relevant evidence as res judicata. We agree and will therefore reverse and remand for a new hearing.[1]

I

FACTS

Daisy was born and raised in the Philippines, and her first language is Tagalog. She and Mark were married for 11 years and have three children together. In January 2017, she filed for divorce in Riverside County Superior Court and took the children with her to a domestic violence shelter in San Bernardino County. A couple of weeks later, and with the help of staff at the shelter, she filed a request for a domestic violence restraining order against Mark in San Bernardino County Superior Court.

[1] Several interested organizations requested permission to submit an amicus brief on Daisy's behalf—UC Davis Family Protection and Legal Assistance Clinic, Women's Transitional Living Center, California Protective Parents Association, Stand Strong, Legal Aid Foundation of Los Angeles, Domestic Violence Legal Empowerment and Appeals Project, California Women's Law Center, Asian Pacific Islander Legal Outreach, Battered Women's Justice Project, Child Abuse Forensic Institute, and Legal Momentum. Because we can decide the appeal on the arguments raised in Daisy's briefs, we exercise our discretion to deny their request. (*Conservatorship of Joseph W.* (2011) 199 Cal.App.4th 953, 957, fn. 2.)

A. *Daisy's Restraining Order Request*

Using the mandatory form for requesting a domestic violence restraining order (Judicial Council form DV-100), Daisy alleged, in general terms, that Mark had abused her on January 23, 2017, February 22, 2017, in June 2014, and in 2010. She checked the firearms box, alleging Mark owned several rifles and hand guns, which he kept around the house and in his truck. At various places in her form, she referred the court to her attached "Addendum" for more detailed allegations of abuse. That document is an eight-page, single-spaced, typed narrative separated into six sections. The relevant allegations are as follows.

In the first section, Daisy alleged Mark raped her on January 23, 2017. She said she "just laid there" and "waited for him to finish" because he never listened when she told him no. A few days after this incident, she took her children with her to a domestic violence shelter (where she was still residing at the time of the hearing). She also alleged Mark hit their children, dismantled her car to keep her from going anywhere, and would take her phone so she could not seek help.

In section two, she alleged Mark forced his penis inside her vagina on February 22, 2015. She said he was aware she had undergone a surgical procedure a month earlier and was told to abstain from sex for four to six weeks. She said she contracted a urinary tract infection from the incident.

In section three, she alleged Mark took the children out for an errand one day in June 2014 and, unbeknownst to her, drove them to Utah where he gave them to his sister who took them to her home in Montana for the summer. With no idea where the children were and fearing being alone in the house with Mark, Daisy slept in her car for three days before deciding to go to court to seek custody of the children. She said she hadn't realized then that she had requested a restraining order instead of custody. The trial court issued a temporary restraining order but declined to issue a permanent order after a hearing. Daisy said she lived in a domestic violence shelter from June to October that year (2014), but returned home after her children came back from Montana because her youngest son was upset by her absence.

In section five, Daisy explained she had a rough and tumultuous upbringing in the Philippines. Her mother was a gambling addict and her father was a physically abusive alcoholic. Her boyfriend drugged and raped her when she was 23 years old, at which point, given her strong Catholic faith, she gave up hope of finding a husband. When Mark was willing to marry her even though she wasn't a virgin, she felt "truly grateful for his mercy that he showed me." According to Daisy, sometime into the marriage, however, he began telling her she suffered from mental illness and convinced his family she was crazy. She again alleged Mark hit the children—spanking them, sometimes with objects, "until they show they are in pain," telling them afterward that he loved them.

Daisy said she was afraid to defend herself against Mark because she feared he would retaliate by taking the kids away from her. "He takes them to his family. It is his way of punishing me." Mark worked as an aviation technician at March Air Force Base, and Daisy was afraid he could "impersonate me through electronic devices."

Finally, Daisy alleged she had been "subjected to sexual abuse over the course of [her] marriage . . . and subjected to marital rape numerous times." She said Mark "will ritually come into the room and force himself on me while the boys are in the same bed." "I ask him to stop, but he will not stop. . . . He will penetrate me with his penis. This is very painful. . . . It is not unusual for Mark to be on the computer late at night to early morning. He will then come and wake me and force himself on me. My sleep is disturbed about three times per week."

The trial court issued a temporary restraining order and set the matter for hearing. Mark filed a response denying he engaged in any of the alleged abuse. He said Daisy was lying to the court "to get a restraining order so she can gain the upper hand in a custody dispute in our dissolution case." "Her allegations of domestic violence, including raping her, are completely untrue. I have not done anything of those things. She simply is mad because I won't send more money to her relatives in the Philippines. That's what this is about."

B. *The Hearing*

The hearing on Daisy's request took place in Riverside Superior Court on March 9, 2017. Both parties agreed to consolidate the dissolution and restraining order matters

before the trial court. Daisy took the stand, and the trial court began by asking her to describe the most recent abuse listed in her request, the January 23, 2017 sexual assault. She said Mark forced himself on her that afternoon against her will. She tried pushing him away and moving away from him, to no avail. The court asked her if she had told him to stop during the incident, and she replied that doing so would not have made a difference. "I have 11 years of not able to sleep because he was so persistent doing what he's doing."

The court moved on to the February 22, 2015 incident. When Daisy started to explain she had undergone a surgical procedure to remove precancerous cells in her cervix and was advised not to have sex for at least a month afterward, the court stopped her and said, "See, I don't know any of this . . . I don't have any paperwork that tells me anything about this." Daisy recounted the incident as she had described it in her Addendum, culminating with unwanted, forced sex a month after her procedure. She said this time she *had* told Mark no and had also been crying the entire time. In response, the court asked if she continued to live with Mark after that incident. She said she had, but had started sleeping in the guest room. The court asked if she continued to have sex with Mark after the incident, and she replied "as husband and wife, no. But he would go to my room when the kids were there and he would sexually abuse me." The court asked whether any of those assaults occurred between the February 2015 and January 2017 incidents, and Daisy responded they happened "[a]ll the time." When the court replied,

"But you didn't list any of those," Daisy said, "I don't know your legal system. I don't know everything."

The court moved to the next allegation of abuse on the DV-100 form, the June 2014 incident when the children stayed in Montana for the summer with Mark's sister. The court told Daisy, "And [your request] says, 'Addendum three.' And I don't have addendum three." It asked her if this incident had been "included" in the 2014 hearing (when the trial court denied her previous request for a restraining order), and she said, "Yes." The court told her it could not consider the incident because another court had already ruled on it.

Next, Daisy gave the court a piece of paper containing various handwritten phone numbers, explaining the handwriting was Mark's and the numbers were ones she had called after going to the shelter in June 2014. She said the paper showed he was capable of tracking her phone and stalking her. She started to testify about the June 2014 child-taking incident again but the court stopped her, saying, "We don't need to go there. There's something called res judicata in this country. Once a court has ruled on an issue, unless it's appealed and reversed, it has to stand. There's been a court who's already considered all of this. Okay? Thank you. So what else?"

Daisy said Mark had dismantled her car on multiple occasions "to make me paralyzed or just stay in the house not to go anywhere." The court told Daisy it didn't see any allegations in her paperwork about cars and asked Mark's counsel for assistance. After counsel handed the court her copy of Daisy's request, the court looked at it and

remarked, "There are some extra pages that were not included in the set, and they are addendum 2, 3, 4, 5, 6 of 8." The following exchange ensued:

"[Counsel]: It sounds like you were missing the meat of her moving papers. Would you like to take copies so you'll have them?

"Court: Yes. If we could make copies so they're in the file. But I have read them. *Most of them pertain to events that happened prior to 2014 and have been adjudicated already*.

"[Counsel]: Correct.

"Court: Thank you. What else, [Daisy]? [¶] . . . [¶]

"Daisy: Can I testify about the sexual abuse?

"Court: . . . I thought we went through that [¶] . . . [¶] you told me about the incident in 2015 and the incident in 2017. Okay? Were there other incidents?

"Daisy: Years.

"Court: But you didn't list them anywhere. You didn't put them down [¶] . . . [¶] But tell me, you feel you've been abused sexually; is that right?

"Daisy: Marital rape, yes.

"Court: Okay. And how many times has that occurred?

"Daisy: At least three times a week. [¶] . . . [¶]

"Court: Did you ever contact the police about that?

"Daisy: No. Because he's been telling to me that if he ever get arrested or I get temporary restraining order, he will lose his job as an avionic technician. [¶] . . . [¶]

"Court: Wait. Wait. Stop. Just a second. If you've been raped by him, that is—it is against the law for anyone to have sex with another person, whether they're married or not, if it's against the consent of the other person. Okay?

"Daisy: Uh-huh.

"Court: But why wouldn't you put that in your paperwork? Because you didn't put anything in your paperwork about being raped three times a week [¶] . . . [¶] See, when you fill out this document, it gets served on the other party so the other party knows what you're saying that constitutes domestic violence. So you're supposed to put the incidents in here so that I know, so that he knows and can properly respond to them if he has things he can respond and say. Do you understand?

"Daisy: Yes.

"Court: Now, you didn't say anything in this document that you—that he was raping you three times a week, so now you're telling me that that's been going on for how long?

"Daisy: Eleven years.

"Court: Eleven years? So for 11 years he's been raping you three times a week?

"Daisy: Yes. [¶] . . . [¶]

"Court: Okay. Are the boys there?

"Daisy: Yes.

"Court: When?

"Daisy: Many times they were there.

"Court: Recently?

"Daisy: Recently. Last January 23 they were not there, but even—because I been sleeping there with them since 2013.

"Court: Okay. What else, ma'am?" (Italics added.)

At that point it appears Daisy became emotional. She said Mark made her feel like a "sexual object" because it was "always penetration, penetration all the time." She concluded her testimony by saying she had found pictures of naked women on his phone on the morning of the most recent time she had gone to the shelter.

The court ruled Daisy had presented insufficient evidence of domestic violence, but let her reopen her case when she asked to examine Mark. Daisy asked Mark what she had seen on his phone in January (before she left for the shelter), and he said he had no idea. The court struck the question as calling for speculation and Daisy responded, "It's okay, Your Honor. You can make a verdict now." Daisy said she felt she was at an unfair disadvantage without an attorney. The court explained the restraining order request process to her, telling her she had to give the other side notice of what she planned to prove. "The system is really relatively simple . . . [W]e expect you to put everything on the form. That form, then, gets served on the other person so the other person knows what you're going to produce in the way of evidence . . . Then we have a trial, and I try to ask you questions. I try to participate and try and get the information out of you as much as I can within the law. [¶] . . .[¶] I can try and get information out of you, but I can't do the cross-examination for you."

The court asked Mark if he had sex with Daisy on January 23, 2017, and when Mark said no, the court responded, "Now, she says you did." Mark's counsel objected that the court was cross-examining Mark for Daisy. Counsel offered to examine Mark and present his defense, but Daisy interrupted and said, "It's okay. Whatever—whatever the verdict is, I will accept it." The court ruled Daisy had presented insufficient evidence of domestic violence and denied her request.

Based on Daisy's allegations that Mark hit the children, the court referred the case to Riverside County Child Protective Services for a Family Code section 3027 investigation.[2] It then issued temporary orders granting Daisy sole physical custody of the children and allowing Mark supervised visitation at the shelter where they were living with Daisy. Daisy timely appealed the court's denial of her restraining order request.

II

ANALYSIS

A. *General Principles*

Under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.), a court may issue a protective order "'to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved' upon 'reasonable proof of a past act or acts of abuse.'" (*Nevarez v.*

[2] "If allegations of child abuse, including child sexual abuse, are made during a child custody proceeding, the court may request that the local child welfare services agency conduct an investigation. . . . Upon completion of the investigation, the agency shall report its findings to the court." (Fam. Code, § 3027, subd. (b).)

Tonna (2014) 227 Cal.App.4th 774, 782.) As relevant here, the DVPA defines domestic violence as abuse of a spouse or the child of a party. (Fam. Code, § 6211, subds. (a) & (e), unlabeled statutory citations refer to this code.) Abuse includes placing a person "in reasonable apprehension of imminent serious bodily injury to that person or to another" or engaging in "any behavior that has been or could be enjoined pursuant to Section 6320." (§ 6203, subd. (a)(3), (4).) Enjoined conduct includes molesting, striking, stalking, threatening, or harassing. (§ 6320, subd. (a).) "The DVPA requires a showing of past abuse by a preponderance of the evidence." (*In re Marriage of Davila & Mejia* (2018) 29 Cal.App.5th 220, 225 (*Davila*).) The statute should "be broadly construed in order to accomplish [its] purpose" of preventing acts of domestic violence. (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1498.) We review the trial court's grant or denial of a DVPA restraining order request for abuse of discretion. (*Davila*, at p. 226.)

C. *Sexual Abuse*

Daisy argues the court erred when it concluded she had not alleged in her moving papers that Mark had raped her three times a week. We agree.

The court's response to Daisy's sexual abuse testimony is problematic for two reasons. First, the record demonstrates the court incorrectly believed a DVPA restraining order applicant must put the respondent on notice of each specific incident of abuse. The court told Daisy that by failing to allege Mark raped her three times a week she had deprived him of notice and impaired his ability to defend himself. "[Y]ou're supposed to

put the incidents in here . . . so that he knows and can properly respond to them if he has things that he can respond and say." The court placed too heavy a burden on Daisy.

As recently explained in *Davila*, general allegations of abuse place the respondent on notice the applicant will testify about specific acts of abuse at the hearing. (*Davila*, *supra*, 29 Cal.App.5th at p. 222.) In *Davila*, the wife stated in her restraining order request that her husband "threatened to physically harm her" and that she feared for her and her children's safety. (*Id.* at p. 223.) After a hearing at which both she and the husband testified, the court granted the request on the ground she had "recounted that [he] had held a gun to her head on three occasions." (*Id.* at p. 225.) On appeal, the husband argued the trial court had erred in allowing the gun testimony because the wife hadn't "ma[d]e that specific allegation in her request." (*Id.* at p. 227.) The *Davila* court rejected this argument, concluding the wife's general allegations that he had threatened physical violence and she was scared of him "placed [him] on notice that she based her request for a DVRO on the threat of physical violence [he] posed both to her and her children." (*Ibid.*) The court further concluded the husband had an opportunity to respond to the incident-specific testimony at the hearing or could have requested a continuance if he felt he needed more time to respond. (*Id.* at pp. 227-228.)

Here, the trial court was too protective of Mark's due process rights at the expense of Daisy's right to seek protection under the DVPA. Daisy's general allegations of sexual abuse were sufficient to allow her to testify about specific incidents of rape. Mark

could respond to her version of the events with his own testimony or request a continuance to prepare his defense.

The second problem is Daisy *had in fact* alleged the specific incidents of sexual abuse. As noted above, she alleged in part five of her Addendum that Mark raped her three times a week. She said he "ritually . . . force[s] himself on me while the boys are in the same bed. I ask him to stop, but he will not stop . . . He will penetrate me with his penis." She said he comes into the room when she is asleep, "wake[s] me and force[s] himself on me. *My sleep is disturbed about three times per week*." (Italics added.) The trial court's remarks during the hearing reveal it was unaware of these allegations. When Daisy testified Mark raped her "[a]ll the time," the court replied, "But you didn't list any of those." Later, when she testified he raped her "at least three times a week," the court replied, "But you didn't list them anywhere. You didn't put them down."

Mark argues any failure on the court's part to spot the allegations in Daisy's paperwork was harmless because it nevertheless let her testify about the alleged abuse, and simply didn't believe her. While it is true we do not reweigh the evidence on appeal and witness credibility is the province of the trial court (*People v. Hovarter* (2008) 44 Cal.4th 983, 996), we do not agree this case comes down to credibility. Rather, it is clear from the record the court's misreading of Daisy's paperwork was prejudicial to her case. The court interrupted her testimony to ask why she hadn't alleged the abuse. "Wait. Wait. Stop. Just a second. *If you've been raped by him*, [¶] . . . [¶] *why wouldn't you put that in your paperwork?* Because you didn't put anything in your paperwork about being

raped three times a week." (Italics added.) As we interpret these remarks, the court's belief Daisy had left the allegations out of her request was precisely what led it to question her credibility. It bears noting that based on our review of the hearing transcript, the trial court was patient with Daisy and willing to help her without stepping into what it viewed as the role of her advocate. If the court had not been under the mistaken impression she had failed to allege years of sexual abuse, we believe it is likely the hearing would have turned out differently.

As a final point, we can understand why the trial court missed Daisy's allegations of past sexual abuse. It appears the Addendum, which was originally filed in a different county, did not make it into the court's file prior to the hearing. In addition, the eight-page, single-spaced document contains numerous allegations and narratives that often do not follow a chronological or topical order. But Daisy's inexperience and language barrier make it all the more important the court fully examine her moving papers. As our colleagues in the Second District have observed, "the high percentage of self-represented litigants (many of whom . . . do not speak English) places a special burden on bench officers who 'cannot rely on the propria persona litigants to know each of the procedural steps, to raise objections, to ask all the relevant questions of witnesses, and to otherwise protect their due process rights.'" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420; *Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861, fn. 3 [estimated 90 percent of litigants in domestic violence restraining order cases appear pro se].) "[I]n light of the vulnerability of the targeted population (largely unrepresented women and their minor

children), bench officers are 'necessarily expected to play a far more active role in developing the facts, before then making the decision whether or not to issue the requested permanent protective order.'" (*Gonzalez*, at p. 423, quoting *Ross*, at p. 861.) What that means for this case is the trial court cannot rely on Daisy to notice its oversight and direct it to the correct place in her moving papers. Having received her eight-page Addendum at the last minute, the court should have taken a brief recess or some other measure to ensure it had reviewed her allegations.[3]

C. *Alleged Abuse in 2014 and Earlier*

As noted above, when Daisy tried to testify about the time Mark gave the children to his sister, the court asked her if the incident had been "included" in the hearing on her 2014 restraining order request, and when she said yes, it refused to hear the testimony on the grounds of res judicata. Later in the hearing, the court determined that "most of [the allegations in the Addendum] pertain to events that happened prior to 2014 and have been adjudicated already." Daisy argues the court's refusal to consider the alleged acts of abuse from 2014 and earlier was improper. We agree.

As far as we can tell, the court had not reviewed Daisy's 2014 restraining order request or the transcript of the corresponding hearing. Instead, it interpreted her

---

[3] At oral argument, Mark's counsel sought permission to file a supplemental brief on whether the trial court was aware of the marital rape allegations in the Addendum and, if not, whether that oversight was prejudicial. The court's awareness of the rape allegations is one of the central issues in this case. Daisy raised the issue in her opening brief (at pp. 10, 26-29) and the parties addressed it during oral argument. We therefore deny counsel's request to further argue the issue.

agreement the 2014 child-taking incident was part of her previous request as a concession the incident and *any other incident from 2014 and beyond* had already been adjudicated. Putting aside for a moment whether res judicata applies, the court should have granted Daisy more leeway in this area. As a self-represented domestic violence litigant whose first language is not English, she could not be expected to grasp the full ramifications of the res judicata doctrine.[4] (*Gonzalez v. Munoz*, *supra*, 156 Cal.App.4th at p. 420.) In addition, had the court fully reviewed the Addendum, it would have understood that the 2014 child-taking incident prompted Daisy to seek what she thought was sole custody of her children (when in reality she had filed a restraining order request). With that background, it is understandable why she answered "Yes" when the trial court asked her if the child-taking incident was "included" in the 2014 hearing. In her mind, it had been the entire reason for the hearing.

Turning to the merits, we conclude the court erred in applying res judicata to any of Daisy's allegations. The doctrine applies when, among other elements, the issues that have been litigated are *identical* to the current issues and the party had a *full and fair* opportunity to litigate them. (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1193 ["'the test is whether the [party] . . . made a detailed presentation of the issues . . . or was given a full opportunity at the time of the hearing to develop the issues by oral testimony'"].)

---

[4] For this same reason, we reject Mark's assertion Daisy forfeited her challenge to the res judicata ruling by failing to object during the hearing. (See *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511 ["whether the general [forfeiture] rule shall be applied is largely a question of the appellate court's discretion"].)

The transcript of the 2014 restraining order hearing, of which Daisy has asked us to take judicial notice, reveals that neither element has been satisfied. (Evid. Code, § 452, subd. (d) [court records are a proper subject of judicial notice].)

At the outset of the 2014 hearing, Daisy requested an interpreter, but the court explained one wasn't on hand because she had not made the proper request in advance. When the court asked Daisy why she felt she needed a restraining order, she replied she was frightened by Mark's "display and use of power." She said she wanted a restraining order "so I can be myself. I can be a better person, mom, and better housekeeper." The court asked if there were any other incidents she wanted it to consider and, tellingly, she responded, "I want you to consider ex-parte hearing for my kids." The court told her they would move on to custody issues next, and denied her request for a restraining order for insufficient evidence.

Under these circumstances, it would be fundamentally unfair to hold the brief, confused 2014 hearing against Daisy as a bar to seeking protection from Mark in 2017. Daisy had believed she was in court to fight for custody. When asked why she needed a restraining order, she vaguely responded that she was afraid of Mark and would be a happier person if protected from him. The court was not called upon to decide whether Mark's giving the children to his sister for a prolonged period—or any other specific incident, like dismantling Daisy's car—was abuse under the DVPA.

D. *Conclusion*

We reverse the trial court's denial of Daisy's request and remand for a new hearing. Daisy's allegations of sexual abuse, phone tracking, taking the children without her knowledge or consent, and dismantling her car—if determined by the trial court to be true—constitute abuse as the DVPA defines it. Given our holding, we do not address Daisy's additional claims of error, and we decline Mark's invitation to sanction her and her counsel for filing a frivolous appeal.

III

DISPOSITION

We reverse the trial court's order and remand for a hearing consistent with the views expressed in this opinion. Mark shall bear Daisy's costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

MILLER
Acting P. J.

MENETREZ
J.